



PROPOSED RULE MAKING

CR-102 (June 2004)

(Implements RCW 34.05.320)

Do NOT use for expedited rule making

Agency: Department of Labor and Industries

- ☒ Preproposal Statement of Inquiry was filed as WSR 08-04-083 ; or
☐ Expedited Rule Making--Proposed notice was filed as WSR _____; or
☐ Proposal is exempt under RCW 34.05.310(4).

- ☒ Original Notice
☐ Supplemental Notice to WSR _____
☐ Continuance of WSR _____

Title of rule and other identifying information: WAC 296-127-018, Coverage and exemptions of workers involved in the production and delivery of gravel, concrete, asphalt, or similar materials.**Hearing location(s):**
See Attachment 1.**Submit written comments to:**

Name: Sally Elliott
Address: Post Office Box 44400
Olympia, Washington 98504-4400
e-mail yous235@lni.wa.gov
fax (360) 902-5292 by October 29, 2008

Date: Time:**Assistance for persons with disabilities:** Contact

Sally Elliott by October 1, 2008

at yous235@lni.wa.gov or (360) 902-6411

Date of intended adoption: November 18, 2008
(Note: This is NOT the effective date)

Purpose of the proposal and its anticipated effects, including any changes in existing rules: During the last decade the prevailing wage program has seen a number of court decisions identify the extent to which prevailing wages are required to be paid for incorporation and delivery of material on public works projects. In particular, the recent *Silverstreak* case (2007), after several years of court action, clarified coverage for the delivery and incorporation of fill material via belly dump and end-dump trucks. In addition, a series of other published cases (*Heller*, *Superior Asphalt 1 & 2*) provided coverage for repairing and maintaining machinery and the delivery and incorporation of asphalt, sand, dirt, gravel, and crushed rock.

A June 1999 department policy pertaining to the delivery of wet concrete exempts that type of delivery and incorporation from prevailing wage coverage unless the workers operate machinery or use tools that screed, float, or put a finish on the concrete. As a result, the coverage of concrete work is treated differently from other delivery and incorporation work. This policy was developed in response to an unpublished court case (*Holroyd* 1999) and was put in place prior to the rulings of the court in *Silverstreak* and in *Superior Asphalt 2*. The June 1999 policy pertains to the existing version of WAC 296-127-018 and will be superseded by this rulemaking. One change implemented through this rulemaking is that the delivery of wet cement upon a public works project will be subject to prevailing wage because it amounts to incorporation of material.

It is the department's intention, through the rule process, to clarify the coverage of production and delivery services and make the coverage of work and payment of wages consistent with published case law and RCW 39.12's requirement that all work upon public works is paid at prevailing wage rates. The department also seeks to ensure businesses do not encounter unanticipated costs due to a lack of understanding on coverage requirements.

Cases cited above:

Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus. (Superior 1), 84 Wn. App. 401 (1996);
Heller v. McClure & Sons, Inc., 92 Wn. App. 333 (1998);
Holroyd Co., Inc. v. Dep't of Labor & Indus., 93 Wn. App. 1075 (1999) (unpublished opinion);
Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus. (Superior 2), 112 Wn. App. 291 (2002);
Silverstreak, Inc. v. Dep't of Labor & Indus., 159 Wn.2d 868 (2007).

Reasons supporting proposal: See purpose statement.**Statutory authority for adoption:** Chapter 39.12 RCW, RCW 43.22.051, and RCW 43.22.270**Statute being implemented:** Chapter 39.12 RCW and RCW 43.22.270**Is rule necessary because of a:**

- | | | |
|-------------------------|------------------------------|--|
| Federal Law? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| Federal Court Decision? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |
| State Court Decision? | <input type="checkbox"/> Yes | <input checked="" type="checkbox"/> No |

If yes, CITATION:

DATE

September 16, 2008

NAME (type or print)

Judy Schurke

SIGNATURE**TITLE**

Director

CODE REVISER USE ONLY

OFFICE OF THE CODE REVISER
STATE OF WASHINGTON
FILED

DATE: September 16, 2008**TIME:** 1:51 PM**WSR 08-19-085**

Agency comments or recommendations, if any, as to statutory language, implementation, enforcement, and fiscal matters:

Not Applicable

Name of proponent: Department of Labor and Industries

☐ Private
☐ Public
☒ Governmental

Name of agency personnel responsible for:

Name	Office Location	Phone
Drafting..... David Soma	Tumwater, Washington	(360) 902-5330
Implementation.... Patrick Woods	Tumwater, Washington	(360) 902-6348
Enforcement..... Patrick Woods	Tumwater, Washington	(360) 902-6348

Has a small business economic impact statement been prepared under chapter 19.85 RCW?

☐ Yes. Attach copy of small business economic impact statement

A copy of the statement may be obtained by contacting:

Name:

Address:

Phone:

Fax:

e-mail:

☒ No. Explain why no statement was prepared.

Prevailing wage work is work done at the cost of the public. Chapter 39.04 RCW defines public works projects as those executed at the cost of the state or of any municipality. It is expected that all firms involved in the production, transportation, delivery, and incorporation of materials pass on the costs of paying prevailing wage rates to the public through their submission of bids to perform public work. The costs of filing statements of intent to pay prevailing wages and affidavits of wages paid under RCW 39.12 for activities covered by WAC 296-127-018, and associated administrative costs, if any, represent no more than minor costs on businesses under RCW 19.85.020(2). Proposed rules that do not impose more than minor costs on businesses in an industry are exempt from the requirement to prepare a small business economic impact statement under RCW 19.85.030(1)(a). This proposal will not impose more than minor costs on businesses.

Is a cost-benefit analysis required under RCW 34.05.328?

☒ Yes A preliminary cost-benefit analysis may be obtained by contacting:

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Address: Post Office Box 44400

Olympia, Washington 98504-4400

Phone: (360) 902-6411

Fax: (360) 902-5292

e-mail: yous235@lni.wa.gov

☐ No: Please explain: